No. 15,625

United States
COURT OF APPEALS

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GIUSTINA BROS. LUMBER CO.,
Respondent.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Respondent, Giustina Bros. Lumber Co., petitions for rehearing and respectfully submits:

1. The Court in its opinion said that Respondent resisted the entire order of the Board and so apparently the Court did not give consideration to defenses of Respondent against parts only of the order of the Board. In this it is submitted the Court erred. Respondent in its answer to the petition for enforcement expressly prayed that if the order be not set aside in full, that parts of the order be denied enforcement (R. 246, 247).

The failure to consider these partial defenses is to disregard the reviewing responsibility of this Court as enunciated in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474.

2. The Court erred in its conclusion that Respondent did not attack "the legal conclusion that the conduct of Respondent, if it in fact occurred, constituted unfair labor practices." As pointed out by the Court, the bulk of the testimony was stipulated by the parties (p. 3, footnote 10). By this stipulating of the facts, the only important issue that remained was the legal question—did the admitted facts constitute unfair labor practices. Counsel for Respondent before the Board and this Court has contended strenuously that the facts do not constitute unfair practices. If Respondent had not challenged the legal conclusions to be drawn from those facts, there was no point to be gained by Respondent in defending itself. Respondent has not confessed or admitted the commission of any unfair practice. The issues presented are legal. Respondent has not waived them. We refer to Respondent's Brief for our consideration of them.

3. The Court erred in holding the economic strike was prolonged by Respondent's conduct before the strikers were replaced.

The record shows the strikers were replaced by August 15th. The refusal to bargain is based on conduct which occurred August 31st, some sixteen days after the strikers were replaced.

What occurred at the meeting of July 28th with the employes could have no affect upon the duration of

the strike. The Local Union would not negotiate with Respondent. It had transferred bargaining authority to the District Council. The strike issue was a wage demand; it was not over recognition or a refusal to bargain. The industry-wide nature of the strike continued for a month more. Respondent did not refuse to negotiate with the Local Union before the strikers were replaced. Under these circumstances *West Coast Casket Co., Inc. v. N.L.R.B.,* 205 F.(2d) 902 and *Maestro Plastics v. N.L.R.B.,* 350 U.S. 270, are not in point. See *N.L.R.B. v. Scott & Scott,* 9 Cir., 245 F.(2d) 926.

Respectfully submitted,

RICHARD R. MORRIS

I, Richard R. Morris, do certify that in my judgment the foregoing Petition for Rehearing is well founded and not interposed for purposes of delay.

RICHARD R. MORRIS,
Attorney for Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

A major objection presented by Respondent to the enforcement of the order of the Board is that the strikers against Respondent were replaced while the strike was an economic one. This issue received no apparent consideration by the Court. Presumably, it was dismissed by the Court by the general rejection of Respondent's contentions on the ground that it attacked the entire order of the Board.

By so doing the Court, we submit, erred. Respondent, in its answer to the Petition for Enforcement, presented this defense (R. 246). It concluded its answer to the Petition praying:

> "Wherefore Respondent prays this Honorable Court that it deny enforcement of the Order of the Board in whole, or, if such prayer be denied, that it deny enforcement of the Order of the Board in such part as it is not supported by evidence as herein set forth, and insofar as denial (sic denied) relieve Respondent, its officers, agents and representatives of any necessity to comply therewith."

Furthermore, this approach to the case adopted by the Court is inconsistent with the duty imposed upon it, as a Court of review, by the Supreme Court in the *Universal Camera* case, 340 U.S. 474, 490. The Court there said:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.

> Reviewing courts must be influenced by conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Board found that Respondent committed an unfair labor practice by its participation in the back to work meeting on July 28. Assuming the Board's finding to be warranted by the evidence, that finding is not decisive of the issue. It must also be shown that that unfair act converted the economic strike into an unfair practice strike before the strikers were replaced. The record establishes that this meeting and Respondent's conduct could not have had the slightest effect upon the continuance of the strike.

We turn to the facts in this case and the applicable law. There is no dispute as to either. It is conclusively established that:

1. The Lumber and Sawmill Workers' Union called a strike against many lumber operations in Oregon and Washington to support its demand for a wage increase. Respondent was just one of the operations whose employes struck. The Local Union which represented

Respondent's employes participated in the strike. The strike was industry-wide. It was not confined to Respondent's operations.

2. The industry wide strike continued as an industry strike (not one directed solely at Respondent), until the last of August. During this entire period of the strike the Local Union had delegated its negotiating authority to the Willamette Valley District Council of Lumber and Sawmill Workers. Respondent, similarly, had delegated bargaining authority to an operators' group—Willamette Valley Lumber Operators Association. During this period of the strike no effort was made by the Local Union or the District Council to settle the strike with Respondent.

August 26 a Committee appointed by the Governors of the States of Oregon and Washington proposed a formula to settle the issues over which the strike was called. By acceptance of this formula the industry strike was settled.

3. A back to work movement started among the employes of Respondent the latter part of July—one month before the industry strike was settled. As a result, some of the strikers returned to work. Other strikers also went back to work. These returning strikers were supplemented by other employes in sufficient numbers so that by August 15 Respondent had a full complement of employes at work. At that time—August 15—all strikers had been replaced.

These facts are uncontradicted. The law is as clear as these facts. The controlling principles are:

Employes who engage in an economic strike may be replaced by other workers. When such strikers are replaced they no longer possess any employment rights.

The commission of an unfair labor practice by an employer after an economic strike has started does not prevent the employer from replacing strikers. The commission of an unfair practice is material only if it be established that it prolonged the strike. Persons employed as replacements after the strike started and before it was converted into an unfair labor practice strike lose their status as employes by the act of replacement.

These controlling principles are not questioned. They are well established. This Court, in *N.L.R.B. v. Scott & Scott,* 245 F.(2d) 926, considering this question, said:

"The Trial Examiner assumed for the sake of argument that the discharge of Ross was the motivation for the strike. The subsequent evidence before the Board must have established a casual connection between any unfair labor practice now found and the subsequent strike.

In *Winter Garden Citrus Products Cooperative v. National Labor Relations Board,* 5 Cir., 238 F. 2d 128 (31 Labor Cases Par. 70,317), upon finding that such casual connection was not shown, the court refused to enforce the order requiring reinstatement. A like result obtains where unfair labor practices are claimed to prolong a strike, and no casual relation between them is shown."

"No view to the contrary is expressed in *National Labor Relations Board v. West Coast Casket Co.,* 9 Cir., 205 F.2d 902 (23 Labor Cases Par. 67,712), since that case merely holds that there was

> substantial evidence to support the finding of the Board that the strike was caused in part by an unfair labor practice."

In the *Winter Garden Citrus Products Cooperative* case, approved by this Court, the Court said:

> "There must be proof of casual connection between the two to justify the finding that the strike was bottomed in part upon unfair labor practices entitling striking employees to reinstatement.
>
> A careful reading of the evidence here fails to convince us that the Board had before it substantial evidence upon which to base its findings of such a casual connection."

It is equally clear that strikers replaced before an economic strike is converted into an unfair labor practice strike, no longer have employment rights. *Black Diamond Steamship Corp. v. N.L.R.B.*, 94 F.(2d) 875 (C.A. 2, 1938), *N.L.R.B. v. Remington Rand, Inc.*, 130 F(2d) 919 (C.A. 2, 1942), *N.L.R.B. v. Pecheur Lozenge Co.*, 209 F.(2d) 393, (C.A. 2, 1953) c.d. 347 U.S. 953.

The General Counsel, neither in his Brief nor in oral argument, has referred to any evidence to show that the strikers were not replaced by August 15th. He has not cited any occurrence or evidence to establish that the strike was converted into an unfair labor practice strike prior to August 15th. He does not make any serious contention to the contrary—nor will the record support such a contention.

The strike was an industry-wide strike in Oregon and Washington. Respondent's operation was just a small part of that strike. The Union representing Re-

spondent's employes had delegated bargaining authority to the District Council—making it an integral part of the industry strike. The industry strike continued at least until August 26th. Nothing that occurred at Respondent's operation, nothing Respondent did prior to August 26, could change the character of the economic strike prior to the time of the industry settlement about August 26th. During that period the strikers were replaced.

We submit that after the strikers were replaced they had no employment rights and Respondent was under no obligation to reinstate them; after these replacements, the Local Union no longer represented the men and Respondent could not lawfully bargain with it.

The portions of the Order directing Respondent to offer reinstatement to the strikers and to bargain with the Local Union clearly cannot be supported.

In view of the assumption by the Court that Respondent raised no legal issues and no partial defense, we submit Respondent is entitled to a rehearing.

Respectfully submitted,

RICHARD R. MORRIS.